

1610004 (Migration) [2018] AATA 3748 (27 August 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1610004

MEMBER: Justin Owen

DATE: 27 August 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 27 August 2018 at 12:46pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – Whether there are compelling reasons to waive Schedule 3 criteria – Applicant provides care and support to Sponsor’s family – Emotional support after Sponsor’s father died – Applicant undergoing rehabilitation after accident – Financial hardship – Difficulties maintaining two households if separated – No compelling reasons – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2 cl 820.211, Schedule 3 3001, 3003, 3004

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 15 June 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 12 March 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d). The delegate found that the applicant was not the holder of a substantive visa at the time he lodged the partner visa application. The delegate considered the applicant's request to waive the Schedule 3 criteria, but after considering all the circumstances of the application, the delegate concluded there were not compelling reasons to waive the Schedule 3 criteria.
4. The applicant appeared before the Tribunal on 2 August 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor [and] witness [Ms A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.
8. **Does the applicant meet Schedule 3 criteria, or should those criteria be waived?**
9. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
10. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

11. The applicant provided to the Tribunal a copy of the Departmental decision record. It indicates that the applicant entered Australia on 13 July 2006 on a subclass 573 Student visa that ceased on 18 August 2006. The applicant was then granted further substantive visas and his last substantive visa, a VC-485 visa ceased on 12 January 2012. On 3 January 2012 the applicant applied for a subclass VB-885 visa as a dependant spouse. This was refused by the Department on 24 July 2013. On 12 August 2013 the applicant appealed this decision to the then Migration Review Tribunal (MRT) which affirmed the refusal on 21 May 2014. The applicant then applied for review of this decision at the Federal Circuit Court on 16 June 2014. The case was won by the Minister on [date] September 2015. The applicant then sought judicial review at the Federal Court on [date] October 2015. This case was won by the Minister on [date] February 2016. The applicant then applied for this Partner visa application on 12 February 2016.
12. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994.

Criterion 3001

13. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
14. The Tribunal finds that the applicant last held a substantive visa on 12 January 2012. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c) (i) of Schedule 3.
15. As the Partner visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
16. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Compelling reasons

17. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
18. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
19. The Tribunal invited the applicant to present reasons that might be considered compelling for a waiver of the Schedule 3 criteria. The Tribunal noted that the applicant the evening prior to the hearing had submitted a written submission outlining a range of reasons that might be constitute compelling reasons. The applicant agreed with the suggestion that the Tribunal go through each reason at the hearing and invite the applicant to make oral submissions.

20. The Tribunal referred to the applicant's submission and the 'Summary of claims made for Compelling Reasons'. The Tribunal noted the first reason the applicant provided pertained to the sponsor's sister. The submission notes that the sponsor's sister was involved in a serious [accident] on October 2014 which caused significant long-term physical and cognitive damage to her. The accident caused the sponsor's sister [several injuries]. At the time she also had brain haemorrhaging. The applicant claimed that the applicant together with the sponsor jointly undertake the provision of care and assistance to the sponsor's sister. It is claimed that this arrangement continues today. (T1, Folio.177). This evidence is reflected in the personal statements of the sponsor (T1, Folio 204) and the applicant (T1, Folio.198-199).
21. The Tribunal enquired of the applicant how he provides assistance to the sponsor's sister. He said he and the sponsor assist with shopping and would take the sponsor's sister to specialist appointments. He said after the accident the sponsor's sister was unable to do housework and household chores. He said that at the time the sponsor's sister had also been trying for a child via IVF.
22. The Tribunal noted the [accident] occurred nearly four years ago. The Tribunal noted from the applicant's statement that the sponsor's sister worked as a [occupation deleted] at the time of her accident. The applicant said that the sponsor's sister was off for between three and seven months' work after her [accident]. She has now returned to work and at the time of decision has returned full-time.
23. The applicant informed the Tribunal that the sponsor's sister lives with her husband and her mother. The Tribunal asked the applicant if the sponsor's sister's husband could provide her with assistance. The applicant said that he also helped but he has suffered from a shoulder injury. No corroborative evidence was provided in support of this claim.
24. The Tribunal noted that the applicant claims to take the sponsor's sister to see her specialist. The Tribunal notes that the applicant's submission said that the sponsor's sister is next due to see her specialist in 2019. The sponsor said that her sister sees her specialist [about] every six months.
25. The Tribunal does not consider the care the applicant claims to provide the sponsor's sister is a compelling reason for it to exercise the waiver of the Schedule 3 criteria. The Tribunal notes that the accident occurred almost four years ago and the sponsor's sister has returned to her previous employment. The sponsor's sister on the evidence of the applicant returned to work around 2015. The Tribunal notes that the sponsor's sister resides with her own husband who, his claimed injured shoulder notwithstanding, is available to assist her. The Tribunal furthermore notes that the applicant himself is claiming a range of physical injuries that would impact upon his ability to provide assistance. The Tribunal accepts that the sponsor's sister suffers from some loss of function as a result of the 2014 [accident]. The Tribunal does not however consider that the assistance that the applicant claims to provide the sponsor's sister represents a compelling reason to waive the Schedule 3 criteria. The Tribunal furthermore notes that there is no reason why the sponsor cannot continue to individually provide care and support to her sister as she sees fit.
26. The applicant has submitted that the health issues of the sponsor's mother are compelling reasons for the Tribunal to waive the Schedule 3 criteria. The applicant through his submission has stated that his mother in law suffers from [a range of health issues]. The applicant has claimed that she has [a stress related illness]. The applicant submits that the deterioration of the sponsor's mother's condition has meant that care and support of her that has fallen onto the applicant and sponsor. The sponsor's mother's health and the care the applicant provides her are submitted as a compelling reason to waive Schedule 3.

27. The Tribunal notes that the sponsor in her written submission states that the applicant and her have been caring for her mother, bringing her to medical appointments, assisting with travel and ensuring her household chores are looked after. The parties reflected these claims in oral evidence to the Tribunal. The Tribunal accepts that the sponsor and the applicant provide assistance to the sponsor's mother. The Tribunal however does not consider this a compelling reason for it to waive the Schedule 3 criteria. There is nothing to preclude the sponsor from continuing to assist her mother if the applicant is required to depart Australia and lodge a Partner visa application offshore. The Tribunal furthermore notes that there is a range of government, welfare and charity assistance available to the sponsor's mother as necessary. The applicant said in oral evidence the sponsor's mother has not sought any assistance of this kind. The Tribunal notes that the sponsor conceded in oral evidence that they had not explored what options in terms of government and charities might be available. The Tribunal accepts that the sponsor's mother is elderly and has a range of health problems. The Tribunal does not however consider these matters, plus the assistance the applicant allegedly provides the sponsor's mother, represents a compelling reason for it to waive the Schedule 3 criteria.
28. The applicant has submitted the death of the sponsor's father, the impact upon the family and the support the applicant provided to the sponsor's late father and to the remaining family members as a compelling reason for the Tribunal to waive Schedule 3. The applicant through his submission (T1, Folio.177) writes that the sponsor's father's health deteriorated drastically from December 2015. The applicant claims he provided an 'immense degree' of support to the sponsor's father and to her family. The sponsor's father died in February 2016. The applicant has claimed that the death of the sponsor's father had a profound effect upon the sponsor. He claims that the sponsor since her father's death has suffered serious symptoms of depression which has not been resolved to date.
29. The applicant in his submission states that circumstances concerning her family and her own personal circumstances have caused the sponsor significant mental health issues which would be exacerbated exponentially without the ongoing physical, emotional and financial support and companionship of the applicant remaining in Australia with her. The applicant's submission states that the sponsor has previously been diagnosed with depression. [Sentence deleted]. The submission states that the sponsor previously attended psychological sessions but ceased due to financial hardship.
30. In support of his written submission, the applicant in oral evidence said the depression and grief of the sponsor was one of the main reasons he wished to submit as compelling. He talked of the pain and grief of the sponsor who had a close relationship to her father. The applicant said the sponsor had a few sessions with a psychologist but had not done so for some time. The applicant submitted a Mental Health Plan from March 2016 from the sponsor's GP. The Plan was prepared not long after the death of the sponsor's father. Post-hearing a new Mental Health Plan for the sponsor dated [August] 2018 was submitted by the applicant to the Tribunal. (T1, Folio. 207-209)
31. The sponsor in her written statement provided a great deal of detail concerning her close personal relationship with her late father. The Tribunal accepts that the death of the sponsor's father had a significant impact upon the sponsor and the rest of her family. The Tribunal accepts the evidence of both the sponsor and the applicant that the sponsor enjoyed an especially close and caring relationship with her father. The Tribunal accepts that the loss of her father caused the sponsor significant and genuine grief. The Tribunal is prepared to accept that the presence of the applicant at the time of his loss and after was a comfort to the sponsor. The Tribunal does not however consider the grief of the sponsor at losing her father represents a compelling reason to waive the Schedule 3 criteria. The Tribunal notes that over two and half years have elapsed since the death of the sponsor's father. The Tribunal accepts the sponsor still grieves over her loss. The Tribunal does not

however consider this a compelling reason to waive Schedule 3. Grief after the loss of a parent is to be expected. Long-lasting grief after the loss of a parent is not unusual. The Tribunal appreciates the importance of emotional support in dealing with these life situations. The Tribunal considers the applicant is still able to provide the sponsor with emotional support whilst his Partner visa is processed. The Tribunal is not convinced that the applicant will be unable or somehow precluded from doing so if he is compelled to depart Australia to lodge an offshore Partner visa application. The Tribunal does not consider the death of the sponsor's father, its impact upon the sponsor and the support provided by the applicant are compelling reasons for the Tribunal to waive the Schedule 3 criteria.

32. Similarly the Tribunal notes that the applicant applied for the Partner visa in March 2016, about five weeks after the death of the sponsor's father. The Tribunal has considered whether the loss of the sponsor's father around the time of the lodgement of the application represents a compelling reason for the Tribunal to waive the Schedule 3 criteria. The Tribunal accepts that the loss of her father had a significant impact upon the sponsor and the presence of the applicant at that time assisted the sponsor in coping with her grief. The Tribunal has taken into account the medical evidence supplied concerning the sponsor from that time. The Tribunal however does not consider the illness and death of the sponsor's father around the time of application and its impact upon the sponsor represents a compelling reason to waive the Schedule 3 criteria. The Tribunal notes that the sponsor had the support of her own family during this difficult period. The Tribunal accepts that the applicant played a role in assisting the sponsor and the sponsor's family during this time. The Tribunal does not however consider these were and are compelling reasons for the Tribunal to waive the Schedule 3 criteria.
33. The Tribunal has carefully considered the wider issue of the sponsor's mental health being a compelling reason for it to waive the Schedule 3 criteria.
34. The Tribunal notes the lengthy submissions the applicant has made through his written submission concerning the assessment of compelling reason claims based on depression and mental illness (T1, Folio.175-177). The Tribunal has taken into account the correspondence received post-hearing from the sponsor's GP [Dr B] (T1, Folio.210); her referral to a specialist dated 1 August 2018 for 'anxiety and depressive symptoms' (T1, Folio.209); her post-hearing Mental Health Plan (T1, Folio 207-209) and the personal statements of both the applicant and sponsor. The Tribunal has also taken into account the oral evidence of both the applicant and sponsor.
35. At the hearing the applicant spoke about the sponsor's claimed depression. He said she had had a 'few' sessions with a psychologist. The sponsor at the hearing said that she last saw a psychologist in late 2016 or early 2017. The sponsor said she stopped seeing the psychologist due to the cost. The sponsor said she was due to see her GP and procure a new Mental Health Plan next week. The applicant talked about the symptoms of the sponsor[details deleted].
36. The sponsor in her written statement said that her mental health had been fragile for some time but had been exacerbated firstly by her sister's [accident] and then by her father's death. She states that after being persuaded she visited her GP on 9 March 2016. Her GP she said diagnosed her with depression and referred her to a psychologist. She writes that the applicant provided her with a range of support during this period. She writes that her health which was improving deteriorated again when the applicant's visa was refused by the delegate in June 2016. The sponsor claims that since then it has been a 'tough journey' to achieve a 'healthy frame of mind'. The death of her maternal aunt in March 2017 and the applicant's [accident] in April 2017 have further had an impact upon her mental health. The sponsor said that the fear of losing the applicant had an adverse impact upon her. [Sentence deleted]. The applicant claims these decisions, alongside the applicant's

challenge to find employment and their financial debts have made her even more anxious. The applicant's written statement reflects the sponsor's submissions.

37. The Tribunal has considered the submissions carefully and does not on the evidence before it consider the sponsor's mental health is a compelling reason for it to waive the Schedule 3 criteria.
38. The Tribunal notes that the sponsor's current Mental Health Plan was prepared and provided by the applicant after the hearing and after the Tribunal had asked a range of questions concerning this matter. The Tribunal notes that there was a previous Mental Health Plan in early 2016. The Tribunal finds the specific timing of the preparation of a current Mental Health Plan and the referral of the sponsor to a specialist curious and is of the opinion these documents have been prepared for the purposes of this review.
39. The Tribunal notes that the applicant's claim in his statement that the sponsor is suffering from depression is based upon the diagnosis from the local GP [Dr C]. (T1, Folio. 197). The claim is reflected in the correspondence of her GP [Dr B] (T1, Folio. 210). In the absence of any professional medical evidence from specialists confirming this diagnosis, the Tribunal is not prepared to accept on the evidence the sponsor's claim of depression as a compelling reason for it to waive the Schedule 3 criteria.
40. The Tribunal notes that the GP states that the applicant has been a 'great support for her' and her mental health. The Tribunal notes that the correspondence of the GP does not however reflect specialist medical opinion concerning her mental health. The Tribunal considers the correspondence is likely reflective of the sponsor's testimony to her GP rather than specialist, independent medical opinion. The Tribunal notes this correspondence is dated prior to the assessment of the sponsor's current Mental Health Plan. The Tribunal does not consider the GP's claims concerning the sponsor's mental health represent compelling reasons for the Tribunal to waive Schedule 3.
41. The Tribunal furthermore notes that the GP's Mental Health Plan of 6 August 2018 recommends cognitive behaviour therapy and psychotherapy as treatment for the sponsor. The Tribunal sees no reason why the sponsor would not be able to undertake such treatment whilst the applicant's Partner visa application is processed offshore. The Tribunal is of the opinion the applicant can continue to emotionally support the sponsor via a wide range of communication technologies whilst the sponsor undertakes any treatment.
42. The Tribunal notes that despite the claims of long-term mental health problems, the sponsor did not consult a psychologist for a significant period of time. The applicant claims this was due to financial hardship. The Tribunal pointed out to the applicant that there are a range of programmes [and] were for individuals having difficulty accessing appropriate mental health (including psychology) support due to financial or other circumstances. The applicant claimed he was unaware of these services and had followed the advice of his GP to use Medicare services which eventually were exhausted. The applicant said that the sponsor did not seek any other Government assistance or charity. Given the applicant's claim of the seriousness of the sponsor's mental health as a compelling reason to waive the Schedule 3 criteria, the Tribunal finds it unusual that the sponsor has no specialist independent medical evidence diagnosing these issues. The Tribunal also finds it unusual that the sponsor did not make any visits to a psychologist for a significant period of time. The Tribunal accepts that the parties may have been financially stretched during this period. The Tribunal does not however consider that mental health services were unavailable to the sponsor for this reason. The Tribunal notes that the sponsor appears to have recommenced mental health treatment in conjunction with the Tribunal's hearing and consideration of evidence concerning the applicant's review. The Tribunal is not prepared to waive the Schedule 3 criteria on the facts before it.

43. [Paragraph deleted]
44. The Tribunal notes that the sponsor in her written statement has outlined a number of activities the applicant engaged in to assist her with improving her mental state. These include driving her to appointments and helping with household chores. The Tribunal accepts that the applicant has assisted her with dealing with a range of family issues and loss over the past two and a half years. The Tribunal accepts the applicant has assisted the sponsor around the house with a range of chores and activities. The Tribunal does not however think that these activities – and the challenges the sponsor was facing – represent compelling reasons for it to waive the Schedule 3 criteria.
45. In oral evidence the applicant confirmed that the sponsor has been successfully working on a year-long contract with the [Employer 1] as a full-time [employee] since November 2017. Her job will be up for review according to the sponsor at the end of the year. The sponsor furthermore writes that she returned to work in November 2016. The Tribunal notes that the sponsor has been in gainful employment for nearly two years since she first claimed to be facing mental health issues. There is no evidence or claim made the sponsor's employment has suffered due to the sponsor's mental state.
46. The Tribunal has taken into account the applicant's [accident] in April 2017 and its impact upon the mental state of the sponsor. The sponsor writes in her statement that after the accident 'I was constantly worried and haunted by the prospect of him dying and not being by my side.' The sponsor claims that she had uncontrollable mood swings following the accident. The Tribunal accepts that the sponsor and indeed the applicant were stressed following the applicant's [accident]. The Tribunal does not consider this to be an unusual situation following a serious [accident]. Nevertheless in the absence of independent, specialist medical advice pertaining to the sponsor's mental health, the Tribunal is not convinced that this claim represents a compelling reason for the Tribunal to waive the Schedule 3 criteria.
47. [Sentences deleted]. The sponsor claims that any requirement for the applicant to depart Australia to make a Partner visa application offshore is 'taking away my lifeline, my anchor and my support.' The Tribunal has considered the sponsor's claims carefully. It is not however prepared to waive the Schedule 3 criteria on the basis of such claims. The Tribunal accepts that the loss of close family members has been distressing for the sponsor in recent years. The Tribunal notes that emotional hardship can be considered a compelling factor in regards to Schedule 3 criteria. The Tribunal however is not convinced that emotional support can only be provided when the couple reside under one roof. There is no reason why the same level of support could not have been provided to the sponsor if the applicant was to live and reapply for a Partner visa outside Australia. That is, the Tribunal is satisfied that the applicant could continue to provide emotional support if the waiver was not applied. The applicant and sponsor have both attested to the strength of their relationship and their reliance upon each other. It is not unusual for couples to live separately for a period of time and that should not preclude the provision of emotional support, if this relationship was genuine. The Tribunal therefore does not consider these circumstances as justifying a waiver of the Schedule 3 criteria.
48. On the evidence before it the Tribunal does not consider the mental health of the sponsor – and the support the applicant provides the sponsor – represents a compelling reason for it to waive the Schedule 3 criteria. Given the paucity of independent, specialist professional medical opinion concerning the claimed mental state of the sponsor, the Tribunal is not compelled to waive the Schedule 3 requirements for a Partner visa for these reasons. The Tribunal furthermore notes there is little corroborative evidence beyond the correspondence from the sponsor's GP that refers to the role of the applicant in assisting the sponsor address her claimed depression. The sponsor has established a new Mental Health Plan,

but given it was prepared after the hearing and after the Tribunal raised the matter, the Tribunal gives the Plan little weight in its assessment of waiving Schedule 3. The Tribunal furthermore notes that there is a wide range of medical, government and community support is available to the sponsor to assist her psychologically and emotionally address any mental health issues she may have whilst the applicant is offshore if this is necessary. The Tribunal notes that she has the support of her own family whilst the applicant's Partner visa is processed offshore. The sponsor furthermore can avail herself of a wide number of forms of communication to be in contact with the applicant at any time when she sees fit. Cumulatively, the Tribunal is not satisfied that the claims concerning the sponsor's mental health and the support of the applicant represent a compelling reason to waive the Schedule 3 criteria.

49. The Tribunal has considered the applicant's claim that financial hardship on both himself and the sponsor constituted a compelling reason for the Tribunal to waive the Schedule 3 criteria. The applicant through his submission has claimed he and the sponsor are struggling financially. The applicant has stated that he was involved in a serious [accident] on 20 April 2017 whilst working [in a certain role] and suffered a concussion and musculoskeletal injury. He claims his rehabilitation is still in progress. In oral evidence he stated that he has recently started casual work in [another industry] after a period where he was supported by compensation received from [Insurance provider 1] after his [accident]. The applicant has stated that he and the sponsor have a large outstanding debt on their utility bills due to the financial strain they have suffered. The applicant submits that to separate the applicant from the sponsor would cause substantially more issues for them due to the costs of supporting the applicant's overseas living expenses on top of their already unstable financial position in Australia. The applicant has pointed out that the sponsor's employment contract with [Employer 1] ceases in November 2018. The applicant furthermore states that if the sponsor was to relocate overseas with the applicant then there was no guarantee she would find employment or even be allowed to work.
50. In oral evidence the applicant said he had been receiving \$1,600 monthly from [Insurance provider 1] after his [accident] for a period of 16 months. In the last month he said he had taken a role as a casual security guard as the period of [Insurance provider 1] payments was coming to an end. He said he had previous experience in control room security. The [Insurance provider 1] has been involved in placing the applicant in this role as part of a return to work plan. The applicant said the hours were varied. The sponsor said the role involved a three month trial probationary period.
51. On the evidence before it the Tribunal does not consider the claim of financial hardship represents a compelling reason for it to waive the Schedule 3 criteria. The Tribunal notes that the sponsor is currently earning about \$2,000 a fortnight at [Employer 1]. Whilst her current agreement is due to end in November, the sponsor stated that her position would be reviewed at that time. Even if the agreement is not renewed, the Tribunal notes that the sponsor has a good work history with solid experience in [a particular employment sector] at both [Employer 1] and [Employer 2]. The Tribunal sees no reason why the sponsor would not be able to obtain gainful employment at the end of her existing agreement.
52. The cost of rent was raised by the parties at the hearing. The Tribunal notes that the applicant and sponsor previously resided with the sponsor's mother. The Tribunal enquired as to whether they or indeed the sponsor could not move back in with the sponsor's mother if there was financial hardship. The applicant stated to the Tribunal that he and the applicant had thought about that option and were going to see what happened. The sponsor however said that she could not move back in with her mother because her mother was living with her sister and brother in law, they had family and she would lose face in the community. The Tribunal does not accept this assertion. The Tribunal notes that the applicant and sponsor were prepared to reside with the sponsor's mother and sister for a significant period of time

previously. If financial hardship was such an impediment then the Tribunal does not consider why such an option would not be open to them. The Tribunal furthermore notes that the option remains open to the sponsor and applicant to secure a more affordable residence if rent was a burden and they were facing financial challenges.

53. The Tribunal accepts that the return to work may have been challenging to the applicant given his circumstances. The Tribunal notes however that he has been receiving \$1,600 a fortnight for the past sixteen months and is now in a new role, albeit casual and still in the probation period. The Tribunal also notes that there is a range of government and charitable assistance available to the parties should financial hardship be a significant burden to their everyday lives. The Tribunal accepts that making an offshore Partner visa application involves a degree of financial sacrifice for both parties and may necessitate the applicant and sponsor having to adjust their home finances. The Tribunal accepts that an offshore Partner visa application and the costs associated with the applicant departing and residing offshore does represent a financial burden for the sponsor and the applicant. This however is not an unusual situation for many people applying for a range of visas. The Tribunal does not consider the claims for financial hardship represents a compelling reason for a waiver of the Schedule 3 criteria in the circumstances of this case.
54. The Tribunal has considered any financial hardship the applicant may face whilst offshore. The Tribunal notes that the applicant in oral evidence stated that the sponsor would not financially support him if he were to depart Australia to lodge an application offshore. The applicant and sponsor have also stated that the applicant will find it difficult to obtain employment in India due to both the applicant's injuries and the highly competitive Indian employment market. The Tribunal accepts the applicant is still rehabilitating from his injuries in the [accident] and labour-intensive duties may at this moment in time be difficult. Nevertheless the Tribunal is of the opinion that the applicant can seek employment in India whilst his visa is processed. There is no evidence before the Tribunal that the applicant is unable to work or seek employment. The Tribunal accepts that he may be precluded from seeking current employment as a [occupation] and in some roles requiring him to stand or sit continually for a significant period of time. The Tribunal notes nevertheless that he has recommenced working in Australia. The Tribunal does not accept the argument by the applicant that his 'qualifications skills and experience do not qualify him for many other employment options.' The applicant holds qualifications in [a range of areas]. The Tribunal considers on the evidence the applicant does have the ability to seek employment. The applicant furthermore has family in India including his parents and sister. The option remains open for the sponsor to provide the applicant with financial hardship if she so wishes. The Tribunal does not consider the claim by the applicant of financial hardship constitutes a reason for the Tribunal to waive the Schedule 3 criteria. The Tribunal considers a general and non-specific claim that the applicant will find it difficult to secure employment in India due to the 'highly competitive' employment market is speculative. The Tribunal rejects this as a reason to waive the Schedule 3 criteria.
55. The applicant has claimed the cost of establishing two households whilst the applicant is offshore lodging a Partner visa application is 'unconscionable.' The applicant claims that it is much more difficult to maintain the standard of living for persons living in two separate locations as opposed to cohabitation. The applicant claims this will compound their current financial difficulties. The Tribunal acknowledges the extra financial challenges the applicant travelling off-shore and lodging an application represents to the parties but it does not consider these to be compelling reasons justifying a waiver. It is reasonable and not unusual to expect some degree of financial sacrifice and changed spending habits in the lodgement of a Partner visa offshore. The Tribunal does not consider any changed household income and its temporary impact upon the sponsor whilst the applicant is offshore applying for a Partner visa represents a compelling reason for the exercise of the waiver. The Tribunal is of the opinion the applicant and the sponsor are both able to acquire and undertake gainful

employment. If the relationship is genuine, this state of affairs will be a temporary affair. The Tribunal is not prepared to waive the Schedule 3 criteria for these reasons.

56. The Tribunal has considered the claims made in the applicant's written submission that the applicant will not be given the same accommodating treatment in his employment prospects should if he were to return to India due to the different labour environment and 'absence of a national order which relates to his disability.' The Tribunal considers this claim speculative. The Tribunal accepts that employment laws differ between Australia and India. The applicant however has not provided any evidence that he will be discriminated against in employment in India. The Tribunal does not consider this a compelling reason to waive the Schedule 3 criteria. The applicant has furthermore submitted that without a capacity to work and with mounting expenses both he and the sponsor face destitution and potential homelessness. The Tribunal however gives the applicant's claim of possible future hardship through impecuniosity little weight. It is speculative. There is no evidence he will be unable to secure gainful employment in India. On the evidence the applicant has previous experience, has qualifications and is currently in employment. The Tribunal acknowledges there will be a degree of hardship in relation to seeking appropriate employment and continuing rehabilitation whilst offshore. There will be costs associated with establishing himself in India whilst his Partner visa is processed. The Tribunal however on the evidence does not consider that these claims of hardship represent a compelling reason for the Tribunal to waive the Schedule 3 criteria.
57. The Tribunal has considered the applicant's health and ongoing treatment as a compelling reason to waive the Schedule 3 criteria. The Tribunal has taken into account the various medical evidence submitted by the applicant including correspondence from his GP, orthopaedic surgeon and physiotherapist (T1, Folio.187-194).
58. The Tribunal accepts that the applicant was injured in a [accident] in April 2017. The Tribunal notes that the applicant suffered a concussion and multiple musculoskeletal injuries. The applicant claims he suffers from chronic neck pain as well as pain in other parts of the body. He claims some improvements but states he continues to have difficulties concentrating and focusing due to concussion. He claims his auditory and visual sensory function was affected from the accident and any prolonged sitting causes him pain. He states that he can no longer drive for long periods of time. He claims pain in his neck, right wrist and shoulder. The applicant is undergoing physiotherapy treatment and utilising anti-inflammatories.
59. The Tribunal does not however consider the applicant's injuries constitute a compelling reason for it to waive the Schedule 3 criteria. The applicant in his statement claims it would be detrimental for him to depart Australia as his health is at a critical point in time. He states that he requires ongoing physiotherapy sessions and without those he may incur long-term injuries. He also states he needs to see his orthopaedic surgeon every six months. The Tribunal accepts the applicant desires to continue his rehabilitation. The Tribunal notes that the applicant's health has been improving. The Tribunal notes that the physiotherapist's report of 17 May 2018 (T1, Folio.193) states that the applicant 'is gaining good recovery with physiotherapy treatment'. The physiotherapist at that time recommended the applicant undertake a further 3-month gym and swim program to achieve the goal of gaining strength in core muscles for normal everyday living; avoid any flair ups in the future and stand and sit for an hour with minimal difficulty. The Tribunal accepts that the applicant continues to encounter some pain and challenges from his injuries. The Tribunal notes that he has now returned to employment. The Tribunal is of the opinion that the applicant would be able to avail himself of physiotherapist appointments as appropriate in India whilst his Partner visa was being processed. The Tribunal is of the opinion he would be able to consult an orthopaedic surgeon whilst he was in India at this time. The applicant and sponsor have both claimed the applicant would be unable to obtain the same or similar level of treatment in

India but the Tribunal considers this claim to be speculative. The Tribunal is not convinced that the applicant will be unable to obtain appropriate and ongoing medical and rehabilitation support whilst his Partner visa is processed. The Tribunal is not prepared to waive Schedule 3 on the basis of the applicant's current health and his access to medical and rehabilitation care and support.

60. The applicant has also claimed that he will struggle to keep his medical appointments and improve without the physical presence of the sponsor to support him and remind him to attend his appointments and undertake his exercises. He fears he would fall 'into a state of complacency' and live with pain and ongoing injury for the rest of his life. The Tribunal does not consider this a compelling reason to waive the Schedule 3 criteria. The Tribunal is of the opinion the applicant has a duty himself to ensure he attends appointments and undertakes exercises related to improving his health himself. Furthermore, there is nothing to preclude the sponsor from reminding the applicant to undertake these activities and provide moral support whilst he is offshore via a wide range of modern technologies. The Tribunal is not prepared to waive Schedule 3 for these reasons.
61. The Tribunal notes the claim by both the sponsor and the applicant that the sponsor will be unable to depart Australia with the applicant if he is compelled to return to India to lodge his Partner visa application. The sponsor has claimed that if she went to India she would not be able to get the necessary treatment for her mental health and this could worsen her mental health. The sponsor furthermore claims that she is currently caring for her mother and sister and would be forced to find an alternative carer for them which would cause further financial hardship. She furthermore claims that she would find it difficult to assimilate into any new environment after 15 years in [Australian city 1]. She also points out that she is not a citizen of India, speaks a different language and would find it very difficult to both interact and gain employment whilst offshore with the applicant. In the applicant's written submission it is pointed out that the sponsor residing with the applicant is not viable because the sponsor is a Fijian national with no Indian passport. The applicant however is an Indian citizen with no present rights to enter Fiji. The applicant has submitted in his written submission that there financial difficulties will exacerbate due to the inability of the sponsor to work whilst she is India and the challenges the applicant will face in gaining employment. The applicant submits that the changed living circumstances with them both residing in India would exacerbate the sponsor's depression and expose her to discrimination due to the fact she identifies as Hindu whereas the applicant's religion is Sikh. He said in oral evidence it would be seen in India as an inter-caste marriage. The applicant also writes that the sponsor's family will be left without the support the sponsor currently provides. The Tribunal does not consider these compelling reasons to waive the Schedule 3 criteria. There is no requirement whatsoever for the sponsor to travel to India with the applicant as part of the Partner visa process. There is no requirement for the sponsor to travel offshore with the applicant. There is no requirement for the sponsor to reside with the applicant whilst his Partner visa is assessed off-shore. This is a matter for the applicant and sponsor to determine. The Tribunal does not consider these claims are compelling reasons for it to waive the Schedule 3 criteria.
62. The sponsor claimed in oral evidence to the Tribunal that if the applicant travelled offshore to lodge a Partner visa application whilst she remained in Australia then she would face numerous questions from family and friends. She stated people could be very judgemental and stated this would have an impact upon her mental health. The Tribunal acknowledges that the sponsor would prefer the applicant to remain in Australia. The Tribunal nevertheless notes that Partner visa applications lodged offshore are not in way unusual in Australia. The Tribunal does not consider the sponsor would face any greater judgement than anyone else in a similar situation. The Tribunal acknowledges the sponsor's mental health condition and is of the opinion that there is a range of support and treatment available to her if this factor should cause her any level of distress. The sponsor also has family support in Australia

whilst the applicant can still provide emotional support from offshore whilst his visa application is processed. The Tribunal does not consider this claim of the sponsor to be a compelling reason for the Tribunal to waive the Schedule 3 criteria.

63. The applicant has claimed that he is currently not fit to travel on any international flights on account of his injuries. The applicant however has presented no evidence to corroborate this claim. The Tribunal accepts that he cannot remain seated or standing for a significant period of time. The Tribunal does not however consider this precludes international travel. The applicant would be able to sit and stand as required on an international flight if compelled to return to India to lodge his Partner visa application. The Tribunal accepts the increased difficulties to that of a standard passenger on an overseas flight. The Tribunal however does not consider this a compelling reason to waive the Schedule 3 criteria.
64. Both the applicant and the sponsor at the hearing continued to impress upon the Tribunal at the hearing the duration, strength and mutual commitment of their relationship. The applicant and sponsor have provided evidence concerning the start of their relationship and their journey through until today. The Tribunal has considered their relationship in its own right as a reason for the Tribunal to waive the Schedule 3 criteria. The applicant says that he and the sponsor commenced a relationship in 2014 and became married in 2016. He claims that in June 2017 they began officially living together. The long term, genuine and continuing nature of the spousal relationship between the applicant and sponsor was articulated in support of the application and in favour of an exercise of the waiver by the parties. The genuine nature of their relationship was expressed by the applicant, sponsor and the witness [Ms A] in oral evidence. The Tribunal has reviewed a wide range of materials the applicant provided to the delegate and the Tribunal concerning his relationship with the sponsor. The evidence includes telephone bills; a wide range of photographs of the applicant and sponsor with family and friends; joint bank statements; a Certificate of Marriage; correspondence addressed to both parties at the same residence [in]; extracts from Facebook; and [Driver's] Licences for both parties. The sponsor and applicant each in their written statements have submitted they have been and continue to be in a genuine and continuing relationship. The sponsor and applicant have each outlined in their written statements to the Tribunal the financial aspects, the nature of their household, their commitment to each other and how the relationship is socially recognised (T1, Folio. 195 and 201). The applicant writes that the past three years have been a challenge for both parties and their families. He writes that they see each other every day and they are pillars of support to each other. The Tribunal accepts on the evidence that the applicant and sponsor are known to each other and there has been a married relationship between the parties during the last two years. The Tribunal accepts that the parties have provided each other with support during their relationship and continue to do so. The Tribunal notes that a criterion for the grant of a Partner visa is that the applicant be the spouse or de facto partner of the sponsor. The definition of a spousal relationship relevantly requires that the relationship be "genuine and continuing". Accordingly, the existence of a genuine and continuing spousal relationship is itself a criterion for the grant of a partner visa. A compelling reason justifying waiver of the Schedule 3 criteria must involve something in addition to the basic prerequisite criteria for the grant of the visa. A genuine, continuing and exclusive relationship need not be, of itself a compelling reason for not applying the Schedule 3 criteria. The Tribunal has considered this evidence and the circumstances of the parties' claimed relationship and is of the opinion that there is nothing in the individual circumstances of their particular case that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied, on the evidence before it concerning the relationship of the sponsor and applicant, that there are compelling reasons not to apply the Schedule 3 criteria.
65. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

66. The Tribunal has considered the totality of the applicant's circumstances. Having considered the circumstances singularly and cumulatively, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
67. There is no evidence or suggestion the alternative criteria in cl.820.211 (2A), (2B), (5)-(9) apply.
68. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

69. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Justin Owen
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.